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Supreme Court, U.S.
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Docket No. _____

IN THE SUPREME COURT OF
THE UNITED STATES

NANCY L. KOCH,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
Pennsylvania Department of Corrections, and
PENNSYLVANIA STATE CORRECTIONAL
INSTITUTION–MUNCY

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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Appellant Nancy L. Koch

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I. Questions Presented for Review

1. Whether the Court of Appeals properly affirmed the District Court's Order denying the Plaintiff's Motion to Join Additional Defendants and dismissed the Plaintiff's Amended Complaint? *Suggested answer: in the negative.*

2. Whether the Court of Appeals properly affirmed the District Court's Order dismissing Plaintiff's Amended Complaint for failure to state a claim upon which relief could be grated? *Suggested answer: in the negative.*

3. Whether state sovereign immunity has been abrogated for purposes of the Americans with Disabilities Act? *Suggested answer: in the affirmative.*

4. Whether the Court of Appeals properly affirmed the District Court's conclusion that Plaintiff's Complaint should be dismissed because accommodating Plaintiff would violate the rights of Plaintiff's fellow workers? *Suggested answer: in the negative.*

5. Whether the Court of Appeals properly affirmed the District Court's Order finding that an individual is not a proper defendant in an action under the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq.? *Suggested answer: in the negative.*

6. Whether the Court of Appeals properly affirmed the District Court's order finding that the interactive process is not applicable under the circumstances of this case? *Suggested answer: in the negative.*

7. Whether the Court of Appeals properly affirmed the District Court's Order deciding this matter before facts could be adduced during discovery to support the Plaintiff's cause of action? *Suggested answer: in the negative.*

II. List of All Parties to this Action and Corporate Disclosure Statement

Nancy L. Koch
Commonwealth of Pennsylvania,
Department of Corrections
Pennsylvania State Correctional
Institution–Muncy

There is no parent or publicly held company owning 10% or more of the stock involved in this action on behalf of Nancy L. Koch..

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IV. Citations to the official and unofficial reports of opinions and orders

The Opinion and Order of the United States Court of Appeals for the Third Circuit denying Koch's appeal dated September 13, 2000 is an unpublished opinion at Docket No. 99-4018, Koch v. Commonwealth of Pennsylvania, et al. The Opinion and Order denying rehearing dated October 17, 2000 is filed at that same docket number.

The Opinion and Order of the United States District Court for the Middle District of Pennsylvania dismissing this action dated November 8, 1999 is and unpublished opinion docketed at No. 4:CV-98-892.

V. Basis for Jurisdiction in this Court

A. Appellant seeks review of the Order of the United States Court of Appeals for the Third Circuit dated September 13, 2000 affirming the Opinion and Order of the United States District Court for the Middle District of Pennsylvania dated November 8, 1999 dismissing Appellant's case.

B. Appellant timely sought a panel rehearing and a rehearing en banc from the Court of Appeals on September 27, 2000. The Court of Appeals issued an Opinion and Order denying the Petition for a Rehearing on October 17, 2000.

C. Jurisdiction is conferred on this Court by virtue of 28 U.S.C. Section

1254(1), in that Appellant has filed a writ of certiorari in a civil action.

VI. Constitutional Provisions and Statutes involved in the case

Amendment XI. Suits Against States
42 U.S.C. § 12101. Findings and purpose
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42 U.S.C. § 12202. State immunity
29 C.F.R. § 1630.2 Definitions.

VII. Statement of the Case

Nancy L. Koch commenced this action against Commonwealth of Pennsylvania, Department of Corrections and State Correctional Institution-Muncy ("SCI-Muncy") in the United States

District Court for the Middle District of Pennsylvania for violation of the American with Disabilities Act ("ADA"), 42 U.S.C. §§12101, et seq. on June 4, 1998. (App., pp. 1, 5-54). Koch was employed at SCI-Muncy until retirement effective March 7, 1998. (App., p. 63). She filed a discrimination charge with the Equal Employment Opportunities Commission (EEOC), which issued a "right-to-sue letter" on March 17, 1998. (App., pp. 59-60). She sued. Defendants moved to dismiss on July 7, 1998 (App., p.2), and Plaintiff moved to file an Amended Complaint on August 10, 1998). (App., p.2).

On August 11, 1998, the District Court granted the Motion to amend. (App., p.2). Plaintiff filed an Amended Complaint on August 18, 1998. (App., p.3). Defendants renewed their Motion to

Dismiss on September 1, 1998. (App., p.3). On December 3, 1998, the District Court granted the Motion to dismiss, dismissed the Amended Complaint, renewed their Motion to Dismiss the Complaint, and addressed the change in the Amended Complaint, a letter from Plaintiff's union waiving a grievance.

On December 3, 1998, the District Court (James F. McClure, Jr., J.) granted the Motion to Dismiss, dismissed the Amended Complaint, and directed the clerk to close the file. (App., p.3). On December 31, 1998, Plaintiff appealed,(App., p.4), docketed at No. 99-7002. On July 8, 1999, based upon a decision expected from the United States Supreme Court, this Court vacated the District Court's Order and remanded.

On August 2, 1999, Plaintiff moved to join Defendants. On November 8, 1999,

the District Court denied the Motion and dismissed Koch's Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). On December 8, 1999, Koch again appealed to the United States Court of Appeals for the Third Circuit. On September 13, 2000 the Court of Appeals affirmed. Koch timely petitioned for a panel rehearing and for a rehearing en banc on September 27, 2000, and on October 17, 2000 her petition was denied.

Koch began her employment with the State Correctional Institution - Muncy (hereinafter "SCI-Muncy") on January 10, 1990. Her initial position was a Corrections Officer I. During the next seven years, Defendants consistently recognized her for dependable and outstanding service, resulting in additional responsibilities and duties as well as increases in salary. Her performance

reviews were all average or above, and in 1994 she received a commendation plaque for staffing SCI-Muncy License Therapeutic Community for Incarcerated Females. In August of 1994, Koch was diagnosed with severe vertigo and later additionally diagnosed with diffuse arthralgia, fibromyalgia syndrome and hypothyroidism. On August 4, 1994, her physician provided written notification to Defendants that her medical condition required her to be restricted from working in excess of eight hours per day. Defendants accommodated her request from August 4, 1994 through April 11, 1997 at which time Defendants informed her that effective May 5, 1997 she could no longer continue employment with restrictions. Koch has at all times been capable of performing all essential job functions of a Corrections Officer I.

After Koch filed suit against Defendants, they moved to Dismiss on September 1, 1998. The District Court dismissed the Amended Complaint on the basis that exempting Koch from mandatory overtime would violate the Collective Bargaining Agreement ("CBA") applicable to Koch's employment and notwithstanding waiver of the applicable provision of the CBA issued by Koch's union. The Court of Appeals affirmed.

Basis for federal jurisdiction in the first instance. Koch sued the Commonwealth of Pennsylvania, Department of Corrections and State Correctional Institution–Muncy for violation of the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§12101, *et seq.* Jurisdiction in the trial court was premised upon federal question. 28 U.S.C. § 1331. This matter reached the

United States Court of Appeals for the Third Circuit as an appeal from the final order of a district court. 28 U.S.C. § 1291; Fed. R. App. P. 3.

VIII. Reasons relied on for allowance of the writ

1. The Court of Appeals affirmed the district court's improper denial of the Plaintiffs' Motions to Join Additional Defendants and dismissed the Plaintiff's Amended Complaint. By July 8, 1999 Order, the Court of Appeals remanded Koch's first appeal to the district court and directed that the case be stayed pending a decision by the United States Supreme Court. The Court of Appeals suggested that the district court may wish to permit joinder of additional parties.

Koch moved to join several individual Defendants. She sought permission to join Commissioner Martin F. Horn, Daniel R. Tepsic and Mary V. Leftridge Byrd as Defendants in accordance with Fed. R. Civ. P. 19, 20 and 21.

Fed. R. Civ. P. 20(a) permits parties to be joined as defendants if (1) a right to relief is asserted against each defendant relating to the same transaction or occurrence, Desert Empire Bank v. Ins. Co. of N. America, 623 F.2d 1371, 1375 (9th Cir. 1980); and (2) questions of law or fact common to all parties will arise. Mosley v. General Motors Corp., 497 F.2d 1330 (8th Cir. 1974). Both requirements are met, as the claims against each individual are predicated upon the same facts as the claims against the other defendants. Trying all of the claims together will contribute to judicial

economy and will not prejudice any defendant.

A motion to join parties is proper at any time, Halladay v. Vershoor, 381 F.2d 100 (8th Cir. 1967), unless it will delay the case, Barr Rubber Products Co. v. Sun Rubber Co., 425 F.2d 1114 (2d Cir. 1970), or prejudice a party. Cabrera v. Municipality of Bayamon, 622 F.2d 4 (1st Cir. 1980). Koch's Motion would have done neither, as the proposed defendants were involved in the actions giving rise to her claim. The Motion could not be considered late, as parties have been joined on appeal. See, e.g., Reed v. Robilio, 376 F.2d 392 (6th Cir. 1967). The district court abused its discretion in denying the Motion because all of the requirements for joinder were met and because there was no basis for denying it. The district court's stated ground for denying the Motion was

affirming its prior decision to dismiss based upon its interpretation of Kralik v. Durbin, 130 F.3d 76 (3d Cir. 1997), which is incorrect.

2. **The Court of Appeals affirmed the district court's improper conclusion that Plaintiff's Amended Complaint fails to state a claim upon which relief could be granted.** Koch alleged that she is an individual with a disability and produced a letter from her doctor in support thereof. Prohibited discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. §12112(b)(5)(A). Koch alleged that Defendants did not do so. The court cited Kralik v. Durbin, 130 F.3d 76 (3d Cir. 1997), for the proposition that "an accommodation under the ADA

that violates a collective bargaining agreement is not reasonable if it violates the legitimate rights of the Plaintiff's co-workers under the same agreement." Id. The Court acknowledges that "rights under a collective bargaining agreement may be waived by agreement of the employer and the union." Id. Such a waiver was issued. Attached as Exhibit "A-1" to the Amended Complaint is a letter issued by her union, The American Federation of State, County and Municipal Employees, Council 13 waiving mandatory overtime provisions.

The district court accepted the employer's characterization of the waiver as "too little, too late," and did not permit Koch to proceed. Kralik stands for the proposition that such a waiver would permit Koch's claim. Kralik, supra, at 81. The court dismissed the waiver because it was not presented as part of Koch's claim

to the EEOC and Pennsylvania Human Relations Commission. ("PaHRC"). Id. The waiver is dated August 4, 1998, after commencement of Koch's action in Court and her Complaint to the EEOC and the PaHRC. Id. The union filed a grievance prior to commencement of this action, as the waiver letter itself indicates and the Court acknowledges. Koch worked for three years with the restrictions, from September of 1994 until May of 1997. Even though the Union did not formally waive the CBA until August, 1998, it permitted alleged violation. This Court of Appeals did not decide Kralik until December 12, 1997. Koch obtained the waiver on August 4, 1998.

The District Court further discounted the waiver for being "no waiver at all," citing the Union's statement that Koch must be found to be a qualified individual

and that an eight hour work day is the only reasonable accommodation. The District Court concluded that Koch must prove her case before the waiver is effective. The Court stated that the purpose of the waiver exception is to permit an employee to continue working and relieve the employer of adherence to a CBA. Id. If the Court's interpretation is valid, Kralik's waiver rule would be vitiated. Determination of necessity must precede waiver. The Union could not waive anything before there was conflict. The Court's interpretation puts an employee in the impossible position of having to prove her case before a condition precedent to proving it can be fulfilled. At least the waiver gives rise to an issue of fact of whether Koch is a qualified individual with a disability. The district court further stated that the burden is on the Union "to make the determination that

the infringement is justified. . . ." Kralik, 130 F.3d at 83. By issuing the waiver, the Union did just that, to the extent possible.

The district court's final basis for dismissing the action is "the utter futility of the procedure implicit in the manner in which Koch attempts to present the waiver," in that Defendants' "had a decision to make in early 1997 regarding Koch's employment with accommodations." Id. Koch worked with accommodations for almost three years, without objection. The Union's grievance indicates that it does not support dismissal and does waive the CBA. The CBA non-discrimination provision is the basis of grievance. There is no evidence to suggest that Defendants sought to determine whether waiver would be issued prior to termination.

3. **State sovereign immunity has been properly abrogated for purposes of the Americans with Disabilities Act.** In Kimel v. Board of Regents, 139 F.3d 1426 (11th Cir. 1998), the Eleventh Circuit held that Congress validly abrogated state sovereign immunity in enacting the ADA. Here, the Third Circuit held that Congress did not do so, creating a conflict between the circuits.

The Eleventh Amendment prohibits suits against states in federal court by citizens. Hans v. Louisiana, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890). Congress abrogated Eleventh Amendment Immunity in Section 502 of the ADA, 42 U.S.C. § 12202, which states that "a state shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a

violation of Act." 42 U.S.C. § 12202. Validity of this may be questioned by recent Supreme Court decisions, such as Kimel v. Florida Board of Regents, ___ U.S. ___, 120 S. Ct. 31 (2000) (holding that Congress did not validly abrogate immunity in the Age Discrimination in Employment Act, 29 U.S.C. Section 621, et seq.). The court held that although ADEA contained a statement of intent to abrogate, abrogation exceeded Congress' authority.

The Supreme Court held that Congress' powers under Article 1 do not include the power to subject states to suit at the hands of private individuals, but Section 5 of the Fourteenth Amendment does grant the authority to do so. Id. (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 456, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976)). Section 5 gives Congress power

to remedy and deter violation of rights guaranteed by the Fourteenth Amendment. City of Boerne v. Flores, 521 U.S. 507, 517, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).

The Kimel Court held that requirements imposed by the ADEA on states are disproportionate to any unconstitutional conduct targeted by the Act. Congress can enact legislation if the legislative record demonstrates that Congress has reason to believe that states discriminate and that the discrimination rises to the level of constitutional violation. With ADA, Congress found that large numbers of Americans have disabilities, that society isolates and segregates them, that discrimination persists against them, and that they have no adequate remedy. 42 U.S.C. § 12101. Congress' findings meet the requirement of validly enforcing the

Fourteenth Amendment. The Supreme Court apparently agrees. In granting review in Kimel, the Court did not disturb the Eleventh Circuit's finding that the ADA withstands Eleventh Amendment scrutiny. See Kimel v. Board of Regents, 139 F.3d 1426 (11th Cir. 1998).

4. The Court of Appeals improperly affirmed the District Court's conclusion that Plaintiff's Complaint should be dismissed because accommodating Plaintiff would violate the rights of Plaintiff's fellow workers. In Kralik v. Durbin, 130 F.3d 76 (3d Cir. 1997), the Court of Appeals considered a similar factual situation. An employee requested to be relieved of forced overtime, where assignments were made on the basis of seniority pursuant to a CBA. The Court found accommodation unreasonable, following Eckles v.

Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996) (holding that the ADA does not require special job placement in violation of a seniority system under a CBA). The Kralik Court stated that "the collective bargaining agreement is not necessarily decisive because the union and the . . . [employer] may modify the agreement as they did on a temporary basis. . . ." Kralik, 130 F.3d at 81. Kralik did not produce evidence to indicate that the union would modify the CBA. The Court then noted "***a union waiver of the forced overtime provision would vitiate the Commission's argument that it could not accommodate Kralik without violating the agreement.***" Id. (emphasis added). Koch produced such a waiver. Her union's waiver falls within the exception created by this Court.

In Kralik, the Court of Appeals balanced the ADA's non-discrimination

provision against the rights of other employees. The district court's application of Kralik, if affirmed, would vitiate Kralik and the ADA's non-discrimination provisions in that it would not permit employees with union contracts to obtain waivers necessary for them to prove that violating a CBA is a reasonable accommodation prior to their termination.

5. An individual is a proper defendant ~~in~~ an action under the Americans with Disabilities Act. Koch sought to add as Defendants three officials involved in her termination. She sought injunctive relief against them under Ex parte Young, 209 U.S. 123 (1908). The propriety of such relief is well established. In Thomson v. Harmony, 65 F.3d 1314 (6th Cir. 1995), the court held that prospective relief of reinstatement to job, future support in research and

expungement of personnel record were not precluded by the Eleventh Amendment. Koch sought similar relief. Nothing in the ADA indicates such relief is unavailable.

6. <u>The interactive process is applicable under the circumstances of this case</u>. The Third Circuit did not hold that the interactive process is applicable. ADA Regulations state that "to determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee] in need of accommodation." 29 C.F.R. §1630.2(0)(3). EEOC's interpretive guideline provides that "once a qualified individual . . . has requested . . . a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is

best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability." 29 C.F.R. Pt. 1630, App. §1630.9, at 359. The Third Circuit applied the regulation and interpretative guideline in Taylor v. Phoenixville School Dist., 174 F.3d 158 (3d Cir. 1999). The Court analyzed the interactive process in two steps: First, what notice triggers employer's obligations; and secondly, the parties' duties once the interactive process is initiated. Taylor, supra, 174 F.3d at 158.

Notice does not have to be in writing, does not have to be made by the employee, and does not have to contain the words "reasonable accommodation." The employee must give notice of disability and request assistance. Taylor, 174 F.3d at 158. Koch did both of these. Once employer has enough information to put it

on notice that employee might have a disability, it must participate in the interactive process. Id., at 159. The employer's duty is not triggered by exact knowledge of the employee's condition and accommodation requested. The employer need only know of the disability and request for assistance. If the employer needs further information, *it must ask*. Id. at 160. Koch's employer asked for nothing.

The Taylor Court concluded that based on Taylor's 20 years of performance, employer's knowledge of her disability and request for accommodation, and employer's failure to offer accommodation or assistance finding them, a reasonable jury could conclude that employer did not engage in the interactive process. Id. at 164-65. Summary judgment was not properly entered. This case presents

similar facts and issues. Koch had a long-standing record of performance. The Commonwealth was aware of her disability and request for assistance. Employer failed to offer reasonable accommodations or assistance with them, failing to act in good faith. Koch's suit did not even survive to summary judgment; her claim was improperly dismissed pursuant to Motion to Dismiss, before discovery and before she could ascertain the information her employer had.

The Commonwealth had an obligation to discuss the requested accommodation with Koch and her Union. The Commonwealth honored the request for three years. During that time, accommodation placed the Commonwealth in the same position that it was in at the time of Koch's termination, of allegedly being in violation of the CBA. After three

years, the Commonwealth unilaterally determined that overtime was mandatory and terminated Koch. After she filed suit, the Commonwealth argued, for the first time, that it terminated Koch because of the CBA. After Notice of Termination was given, the Union filed a grievance relating to her termination. When the Commonwealth terminated Koch, it made no effort to ask whether the Union would waive the CBA. Also, it made no effort to advise Koch prior to termination that it would terminate her unless waiver was obtained. The Commonwealth did not act in good faith.

The Commonwealth should have attempted to find a solution to Koch's request. This would require it to speak with medical professionals, her family and her union in fashioning an accommodation. Requiring the Commonwealth to work

with the Union is no different from requiring it to work with others, particularly when the accommodation sought was status quo, i.e., no overtime. Even if it was not necessary for the employer to contact the Union, the employer must at least place the employee on notice that she must contact the Union and seek a waiver. The Commonwealth did not do either of these. Filing the grievance merely placed employer on further notice that Koch was attempting to find accommodation.

To show that an employer failed to participate in the interactive process, a disabled employee must demonstrate: (1) the employer knew about the disability; (2) the employee requested accommodation; (3) the employer did not made a good faith effort to assist the employee; and (4) the employee could have been reasonably

accommodated but for the lack of good faith. Taylor, 174 F.3d at 165. Koch has demonstrated each of these elements.

7. **The District Court improperly decided the matter before facts could be adduced during discovery to support the Plaintiff's cause of action.** To affirm, the Court of Appeals had to determine that no relief could be granted under any set of facts Koch could prove. City of Pittsburgh v. West Penn Power Co., 147 F.3d 256 (3d Cir. 1998). Under the Amended Complaint, Koch could prove all of the facts necessary to recover, including her Union's waiver of the CBA. Assuming the necessary facts could not be proven, however, which Koch does not, the Court denied her opportunity to adduce evidence to prove her case after she made a prima facie case. For example, Koch has been denied opportunity to prove that permitting

her to work only eight hours per day is a reasonable accommodation.

VIII. CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Third Circuit should be **REVERSED**, and this matter should be remanded to the United States District Court for the Middle District of Pennsylvania.

Respectfully submitted,
McNERNEY, PAGE, VANDERLIN
& HALL

By: _____
Robin A. Read, Esquire
Attorney for Plaintiff/Appellant

UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

No. 99-4018

NANCY L. KOCH,
Appellant

v.

COMMONWEALTH OF
PENNSYLVANIA, Pennsylvania
Department of Corrections;
PENNSYLVANIA STATE
CORRECTIONAL INSTITUTION-
MUNCY

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge,
SLOVITER, MANSMANN,

SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, and FUENTES, Circuit Judges, and DUHÉ, Senior Circuit Judge*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

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*As to panel rehearing only.

By the Court,

Dated: October 17, 2000

UNREPORTED/NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 99-4018

NANCY L. KOCH,
Appellant
v.
COMMONWEALTH OF PENNSYLVANIA, Pennsylvania Department of Corrections; PENNSYLVANIA STATE CORRECTIONAL INSTITUTION-MUNCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(Dist. Court No. 98-cv-00892)
District Court Judge: James F. McClure, Jr.

Argued May 23, 2000

Before: ALITO, RENDELL and DUHE,
*Circuit Judges

(Opinion Filed: September 13, 2000)

MEMORANDUM OPINION OF THE COURT

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* The Honorable John M. Duhe, Jr., Senior Judge of the United States Court of Appeals for the Fifth Circuit, sitting by designation.

ALITO, Circuit Judge:

Appellant Nancy L. Koch was fired after her disability made her unable to work mandatory overtime. The District Court dismissed her ADA suit against her employer, a state agency. W affirm.

I.

Nancy L. Koch was employed as a corrections officer at the Pennsylvania State Correctional Institution at Muncy (SCI-Muncy). In August 1994, Koch was diagnosed with severe vertigo and the symptoms of multiple sclerosis. As a result of this condition, she was unable to work more than an eight-hour day. From August 1994 through April 1997, the state accommodated Sortman's disability by excusing her from working overtime.

Overtime for corrections officers was governed by a collective bargaining agreement (CBA) between the state and the officers' union, AFSCME Council 13.

The CBA provided that voluntary overtime was to be offered to officers in order of their seniority and that if volunteers were not available, mandatory overtime was to be assigned in reverse order of seniority. In January 1997, the state won an arbitration award confirming that corrections officers could be required to work mandatory overtime and began to rescind all non-temporary overtime accommodations. The state rescinded Koch's accommodation on April 11, 1997. Koch was placed on leave without pay, was awarded a one-year disability annuity by the state retirement system, and retired from her position on March 7, 1998.

In June 1998, after receiving a right-to-sue letter from the EEOC, Koch filed suit against the Pennsylvania Department of Corrections and SCI-Muncy (the "Commonwealth defendants") in federal court, claiming that her termination violated the Americans with Disabilities

Act (ADA), 42 U.S.C. §§ 12101 et seq. The Department moved to dismiss the complaint, arguing that because Koch's requested accommodation would have violated the CBA, it was unreasonable as a matter of law.

In December 1998, the District Court dismissed Koch's case, holding that the accommodation that Koch required - being excused from mandatory overtime-would have violated the CBA. Citing Third Circuit precedent, the Court held that such an accommodation was not "reasonable" as a matter of law.

Koch appealed, and this Court vacated and remanded. The remand order suggested that the District Court hold the case c.a.v. pending the Supreme Court's decision on Eleventh Amendment immunity in Kimel v. Florida Board of Regents, cert. Granted, 525 U.S. 1121 (1991); that it consider whether Koch should be allowed to amend her complaint

to add individual defendants; and that it consider the effect of this Court's intervening decision in Taylor v. Phoenixville School District, 184 F.3d 142 (3d Cir. 1999), which addressed an employer's duty to engage in an "interactive process" with disabled employees.

Upon returning to the District Court, Koch moved to amend her complaint to name several state officers in their official capacities as individual defendants. The District Court denied this motion in December 1999 on the ground that amendment would be futile. The Court held that an individual is not a proper defendant in an ADA action and reaffirmed its previous holding that the required accommodations were unreasonable as a matter of law because they would have violated the CBA. The Court further reasoned that Taylor did not apply because, in light of the CBA, Koch

could not have been accommodated regardless of whether or not the interactive process occurred. In light of these holdings, the Court again dismissed the case without considering the potential impact of Kimel's holding on Eleventh Amendment immunity. Koch appealed.

II.

As a threshold issue, we must determine whether the federal court may exercise jurisdiction over Koch's action in light of the Eleventh Amendment. Although the District Court did not base its dismissal on Eleventh Amendment immunity, defendants press this argument as an alternate ground for affirmance, and we believe that it is dispositive as to the Commonwealth defendants.

The Eleventh Amendment renders states generally immune from suit by private parties in federal court. See, e.g., Kimel v. Florida Bd. Of Regents, 120 S. Ct. 631 (2000). As agencies of the

Commonwealth of Pennsylvania, see 71 P.S.A. § 71, the Department of Corrections and SCI-Muncy partake of the state's Eleventh Amendment immunity. Koch may only maintain her claims against the Commonwealth defendants, then, if Pennsylvania has waived its immunity or if Congress has validly abrogated its immunity. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55 (1996). Neither of these circumstances is present here. The Pennsylvania Legislature has, by statute, explicitly declined to waive its Eleventh Amendment immunity. See 42 P.S.A. § 8521(b). And this Court has recently held that "Congress did not validly abrogate the States' Eleventh Amendment immunity in enacting the ADA." See Lavia v. Pennsylvania Dep't of Corrections, -F.3d-, 2000 WL 1121553, *10 (3d Cir. Aug. 8, 2000). Accordingly, we hold that Koch's suit against the Commonwealth defendants is precluded by Eleventh Amendment

immunity.

III.

Because the Commonwealth defendants are immune from suit, Koch can continue this action only if she is able to name additional, individual, defendants. See Wheeling & Lake Erie Ry. Co. v. Public Utilities Comm'n of Commonwealth of Pennsylvania, 141 F.3d 88, 91 (3d Cir. 1998) (suit against state officers for prospective injunctive and declaratory relief not barred by Eleventh Amendment). The District Court, however, denied Koch leave to amend her complaint in order to add as defendants (in their official capacities) the Secretary of the Department of Corrections, the Director of the Department's Bureau of Human Resources, and the Superintendent of SCI-Muncy. Because we agree that amendment would have been futile, we affirm the denial of leave to amend.

In Kralik v. Durbin, 130 F.3d 76, 79

(3d Cir. 1997), this Court held that "a measure that violates a seniority system established in a collective bargaining agreement is not a 'reasonable accommodation,' and thus is not required by the ADA." Kralik qualified this rule, however, noting that 'a union waiver of the forced overtime provision would vitiate the [defendant's] argument that it could not accommodate [the plaintiff] without violating the agreement." Id. at 81. Koch argues that she obtained just such a waiver.

She points to a letter from the union that she obtained some 15 months after being terminated. The letter stated in relevant part:

> [I]n the event that it is determined, in either the grievance process or the civil suit, that Ms. Sortman is a qualified individual with a disability, and that she can only

> be reasonably accommodated by allowing her to work no more than eight hours per day, Council 13 will waive the mandatory overtime provisions of the Collective Bargaining Agreement as they apply to Ms. Sortman.

App. 107. Moreover, she notes that the union never objected to her exemption from mandatory overtime from April 1994 through 1997. These arguments are unavailing.

First, the mere failure of the union to object to her past exemption does not constitute an effective waiver under Kralik. In that case, the plaintiff placed weight on the fact that, although her employer had exempted her from CBA-mandated forced overtime during the litigation, the union had not instituted any grievance proceeding. The court found this

irrelevant:

> [I]t does not follow that the union will remain willing to refrain from grieving in the future . . . We decline to hold that the [employer] is required to accommodate [the plaintiff] for the duration of her disability as we cannot assume that the union's acquiescence will continue indefinitely.

Kralik, 130 F.3d at 83. n.7. The union's lack of action to date is similarly inconclusive here.

Second, as the District Court held, the union's letter was not an effective waiver. As an initial matter, the "waiver" is conditional: it is based on a finding, either through the grievance procedure or litigation, that Koch is a qualified disabled employee who can be reasonably accommodated only be exemption from

mandatory overtime. This condition would subject the employer "to the cost of defending itself against grievances" and to costly litigation - costs which the Kralik Court seemed interested in avoiding. Kralik, 130 F.3d at 83.

More importantly Koch's "waiver" was not obtained until almost 15 months after the alleged adverse employment action, and therefore was of little use to an employer required to make a timely personnel decision. As the District Court explained:

> SCI-Muncy had a decision to make in early 1997 regarding Sortman's continuing employment with accommodations. It concluded that the accommodations violated the CBA, thereby exposing it to grievance . . . Once defendants moved to dismiss the complaint, Sortman

obtained the letter from the union regarding waiver of enforcement of the CBA. By that time, the adverse job action about which Sortman complains was well over a year in the past. It is impossible in these circumstances for an employer to refrain from making its own decision about which course to take because it is already subject to liability one way or another. If the union does not waive enforcement of the CBA, the employer is liable if it has kept the employee. If the union waives enforcement of the CBA, the employer is liable if it has terminated the employee. Yet the employer has no way of knowing which course the union will take at the time that it makes the employment decision.

District Ct. Op. 7-8. At the time of the adverse action, then, the requested accommodation would still have required the employer to "violate its collective bargaining agreement and run the risks that the violation entails." Kralik, 130 F.3d at 83. Koch's tardily-obtained "waiver" may not be construed retroactively to render her employer's actions unreasonable.

We therefore hold that Koch's proposed amendment would have been futile, and because Koch could not have been reasonably accommodated, her argument regarding the "interactive process" cannot succeed. See Donahue v. Consolidated Rail Corporation, 2000 WL 1160947 (3d Cir. 2000) at *4- *7.

IV.

For the foregoing reasons, the judgment of the District Court is affirmed.

TO THE CLERK:

Kindly file the foregoing Memorandum Opinion.

/s/ Samuel A. Alito, Jr.
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CYNTHIA M. SORTMAN,	:	
Plaintiff	:	**No. 4:CV-98-0891**
v.	:	**(Judge McClure)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CORRECTIONS, and STATE CORRECTIONAL INSTITUTION-MUNCY,	:	
Defendants	:	

NANCY L. KOCH,	:	
Plaintiff	:	**No. 4:CV-98-**

	:	0892
v.	:	(Judge
	:	McClure)
COMMONWEALTH	:	
OF PENNSYLVANIA,	:	
DEPARTMENT OF	:	
CORRECTIONS, and	:	
STATE	:	
CORRECTIONAL	:	
INSTITUTION-	:	
MUNCY,	:	
Defendants	:	

ORDER

November 8, 1999

BACKGROUND:

On December 3, 1998, pursuant to Fed. R. Civ. P. 12 (b) (6), we dismissed the above captioned cases, which were brought under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq.

Plaintiffs Cynthia M. Sortman and Nancy L. Koch thereafter filed notices of appeal. The Third Circuit remanded in light of intervening decisions issued by itself and the Supreme Court of the United States. The Third Circuit also recommended several actions that this court or the parties might take, including an amendment to the complaint to add state officials who would be proper parties in an action for injunctive relief, as well as holding the action in abeyance "CAV."

Before the court are plaintiffs' motion to join defendants, which in effect are motions to amend the complaints. The motions are opposed.

DISCUSSION:

Recently, the Supreme Court issued a trio of cases dealing with states' sovereign immunity from suit in federal court. Alden v. Maine, 119 S. Ct. 2240 (1999) (states immune from suit under Fair Labor

Standards Act); Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 119 S. Ct. 2199 (1999) (states immune from suit for patent infringement action under Patent and Plant Variety Protection Remedy Clarification Act); College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. 2219 (1999) (states immune from suit under Lanham Act and Trademark Remedy Clarification Act). Based on those decisions, it appears likely that the Supreme Court will find that states are entitled to sovereign immunity from suit under the ADA as well, and the Court has granted certiorari in such a case, Kimel v. Florida Board of Regents, 119 S. Ct. 901 (1999). For the present time, the governing authority of the Third Circuit is to the effect that sovereign immunity has been abrogated for purposes of the ADA. Yeskey v. Commonwealth of Pennsylvania Dept. of Corrections, 118 F.3d 168 (3d Cir.

1997), aff'd on other grounds, 524 U.S. 206 (1998) (referring to whether a state prisoner had the right to bring an action under the ADA for exclusion from a prison program).

If the Kimel decision is such that state sovereign immunity applies, then our dismissal as to the Commonwealth will be under Fed. R. Civ. P. 12(b) (1), as opposed to our original basis, Fed. R. Civ. P. 12(b) (6). The Third Circuit in its remand order in this case suggests pointedly that this court "will, of course, want to hold the matter CAV pending the decision in Kimel." Remand Order at 2. Although we indicated previously that we would do so, Order of Court dated July 14, 1999, at 3, having reviewed the parties' briefs with respect to the motion to amend, we see no purpose in continuing to hold the cases in abeyance.

In dismissing the action previously, we noted that the ability of plaintiffs'

union to enforce a collective bargaining agreement rendered unreasonable any effort to accommodate plaintiffs' disabilities. Plaintiffs continue to argue that it was unreasonable for defendants not to seek a waiver of the CBA from the union. Actually, the union declined to waive the CBA unless, in effect, plaintiffs prevailed in litigation of their claims, at which time the waiver would be pointless. This principle governs regardless of the identity of the named defendant.

The Third Circuit also suggested that we may wish to consider whether plaintiffs should be granted leave to amend the complaint to name individual defendants in their official capacity for the purpose of seeking injunctive relief. Id. It noted also that amendment would be futile if we adhere to our prior ruling on the merits, but that the rationale for our prior ruling is brought into question by an intervening decision of the Third Circuit. Id. at 2-3

(citing Taylor v. Phoenixville School District, 174 F.3d 142 (3d Cir. 1999)). The referenced Taylor opinion was subsequently vacated for rehearing in light of Sutton v. United Airlines, 119 S. Ct. 2139 (1999), and Murphy v. United Parcel Service, 119 S. Ct. 2133 (1999).

Actually, the suggested amendment is futile regardless of Taylor as originally issued or on rehearing because an individual is not a proper defendant in an ADA action. Cohen v. Temple Physicians, Inc., 11 F. Supp. 2d 733, 736-737 (E.D. Pa. 1998); Popko v. Pennsylvania State University, 994 F. Supp. 293, 296 (M.D. Pa. 1998) (Caputo, J.); Amariglio v. Nat'l R. Passenger Corp., 941 F. Supp. 173, 178 (D.D.C. 1996). Thus, while naming individual state officials would circumvent the Eleventh Amendment bar, it otherwise would render the cause of action invalid. We note that the case cited by the Third Circuit in support of the proposition that

individual officials may be named as defendants for the purpose of seeking injunctive relief, Thomas v. Harmony, 65 F.3d 1314, 1320-1321 (6th Cir. 1995), involved an action brought under 42 U.S.C. § 1983 for retaliation for the exercise of First Amendment rights. Unlike an ADA claim, an action under § 1983 may be brought against an individual defendant.

Also, Taylor does not change our disposition of this case. The Third Circuit in that case first held that the plaintiff was disabled within the meaning of the ADA, with consideration of disability limited to the plaintiff's "unmitigated" state. Id. at 152-153. Taylor was abrogated to this extent by the Supreme Court's opinions in Sutton and Murphy. However, it appears that the remand order is referring to the second issue consideration in Taylor, that of the requirement on the part of an employer to participate in an informal

interactive process with an employee who gives notice of a disability and a desire for accommodation. Taylor v. Phoenixville School District, 184 F. 3d 296, at 311-320 (1999) (incorporating, unchanged, original discussion of interactive process, 174 F.3d at 156-165).

Our reading of Taylor is that it does not control situations such as those presented in the cases now before us. The opinion discusses the need for the employer and the employee to discuss the handicap and potential for accommodation. Obviously, the goal is to reach an amicable resolution. However, in the instant cases, a third party, the union, is involved. Neither the employer nor the employee can force the union to accept a potential accommodation which violated a CBA, and the union here did not agree to waive its right to pursue grievances. Thus, plaintiffs could not have been accommodated regardless of any effort in

the interactive process by defendants. See Taylor, 184 F.3d at 319-320 (employee must show, inter alia, that she could have been reasonably accommodated but for employer's lack of good faith). That is, even if it is true that defendants should have consulted with the union, the union's ongoing refusal to waive the CBA renders the failure to consult a nullity because the interactive process would not have changed the outcome.

In its remand order, the Third Circuit indicated that the primary reason for distinguishing between dismissal under Rule 12(b) (6) and Rule 12(b) (1) is that dismissal under the latter would not have *res judicata* (or claim preclusion) effect on potential claims in state court. Plaintiffs have proceeded in this court and on appeal solely under the ADA, and we are aware of no potential claims to be brought in state court. Moreover, to the extent such a consideration affects these proceedings,

plaintiffs have the right under Fed. R. Civ. P. 60(b) (1) to move to set aside our judgment as void if the Supreme Court decides that we lack jurisdiction. See also 42 Pa. Cons. Stat. Ann. § 5535 (permitting party on year to commence a new action if prior action terminated for reason other than judgment on the merits).

In short, we reach the following conclusions:

(1) Under present law as determined by the Third Circuit, we have jurisdiction to consider plaintiffs' ADA claims.

(2) Plaintiffs' claims are subject to dismissal under Rule 12(b) (6).

(3) Our holding is unchanged by the Third Circuit's opinion issued on panel rehearing in Taylor.

(4) A holding by the Supreme Court that we lack jurisdiction would not alter the ultimate disposition of this case, i.e. dismissal.

(5) The nature of the dismissal as for failure to state a claim upon which relief can be granted or for lack of jurisdiction would not affect potential state court claims, if any such may be brought.

(6) Amendment of the complaint would be futile because individual defendants may not be liable under the ADA.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Plaintiff Cynthia M. Sortman's motion (record document no. 26 in No. 4:CV-98-0891) to join defendants is denied.
2. Plaintiff Nancy L. Koch's motion (record document no. 27 in No. 4:CV-98-0892) to join defendants is denied.
3. The amended complaints are both dismissed pursuant to Fed.

R. Civ. P. 12(b) (6).

4. The clerk is directed to close the files.

/s/ James F. McClure, Jr.
United States District Judge

UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

Nos. 99-7001 & 99-7002

CYNTHIA M. SORTMAN,
Appellant in 99-7001

NANCY L. KOCH,
Appellant in 99-7002

v.

COMMONWEALTH OF
PENNSYLVANIA, ET AL.

Before: BECKER, Chief Circuit Judge,
ROTH and RENDELL, Circuit Judges

AMENDMENT

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It is hereby ORDERED that the Order filed July 8, 1999 in the above case is amended as follows:

On page 2, first full paragraph, line 6, the following phrase should be deleted:

"and Kimel specifically address the validity of that aspect of Yeskey."

BY THE COURT:

CHIEF CIRCUIT JUDGE

DATED: July 19, 1999

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 99-7001 & 99-7002

CYNTHIA M. SORTMAN,
Appellant in 99-7001

NANCY L. KOCH,
Appellant in 99-7002

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

Before: BECKER, Chief Circuit Judge, ROTH and RENDELL, Circuit Judges

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ORDER

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Cynthia Sortman and Nancy Koch appeal from virtually identical orders of the District Court dismissing their suits against the Commonwealth of Pennsylvania, Department of Corrections, under the Americans with Disabilities Act ("ADA"). In the wake of, and in light of, the recent decisions in College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, No. 98-149, 199 U.S. LEXIS 4375 (June 23, 1999), and the fact that the Supreme Court has granted certiorari in Kimel v. Florida Board of Regents, 119 S. Ct. 901 (1999), granting cert. to 139 F.3d 1426 (11th Cir. 1998), we believe that the best course to ensure effective management of this litigation is to vacate the District Court's orders and remand for reconsideration.

The College Savings Bank cases decided that neither the patent nor the trademark laws validly abrogated the states' sovereign immunity from suit,

despite the presence of explicit statutory language indicating a congressional intent to do so. Our prior holding in Yeskey v. Commonwealth of Pennsylvania Department of Corrections, 118 F.3d 168 (3d Cir. 1997), regarding the ADA's abrogation of sovereign immunity, has now been put in question, and Kimel will specifically address the validity of that aspect of Yeskey. The District Court initially dismissed the complaints under Federal Rule of Civil Procedure 12(b)(6); it may be that Rule 12(b)(1) dismissal is required, in which case the dismissal would not have res judicata effects on any potential claims in state court.

The District Court will, of course, want to hold the matter CAV pending the decision in Kimel. In the interim, however, the District Court may wish to consider whether leave should be granted to amend to name an individual defendant in his or her official capacity, in order to

allow the plaintiffs to pursue their claims for injunctive relief. See Ex parte Young, 209 U.S. 123 (1908); see also Thomason v. Harmony, 65 F.3d 1314, 1320-21 (6th Cir. 1995) (finding that prospective relief of reinstatement to job, future support in research, and expungement of personnel record was not precluded by the Eleventh Amendment).

Amendment would be futile if the District Court adheres to its merits rulings on the Commonwealth's motions to dismiss. There may, however, be some questions about the validity of the District Court's rationale in light of our intervening opinion in Taylor v. Phoenixville School District, 174 F.3d 142 (3d Cir. 1999). The parties may wish to develop this aspect of the case and make submissions to the District Court so that if the Court ultimately finds that it has jurisdiction of the plaintiffs' claims, it could then consider the relative obligations of employer and

employee, including initiation of union involvement in the accommodation process. See United State Equal Employment Opportunity Commission, Technical Assistance Manual on the Employment Provisions (Title 1) of the Americans with Disabilities Act, Resource Directory (1992), § 3.9, at III-16 (discussing the accommodation process in the unionized workplace).

Inasmuch as the Supreme Court will likely not decide Kimel until Spring 2000, these recent developments have put the parties into legal limbo. Plaintiffs' union is pursuing grievances contesting their terminations. The District Court may wish to encourage the parties to explore the ability of arbitration to resolve the parties' differences in more timely fashion.

The judgments of the District Court are vacated and remanded for further proceedings in light of this order.

BY THE COURT:

CHIEF CIRCUIT JUDGE

DATED: July 8, 1999

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IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NANCY L. KOCH,	:	
Plaintiff	:	**No. 4:CV-98-**
	:	**0892**
v.	:	**(Judge**
	:	**McClure)**
COMMONWEALTH	:	
OF PENNSYLVANIA,	:	
DEPARTMENT OF	:	
CORRECTIONS, and	:	
STATE	:	
CORRECTIONAL	:	
INSTITUTION-	:	
MUNCY,	:	
Defendants	:	

ORDER

December 3, 1998

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BACKGROUND:

On June 4, 1998, plaintiff Nancy L. Koch commenced this action with the filing of a complaint pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq. Koch was employed as a corrections officer at the Pennsylvania State Correctional Institution at Muncy, Lycoming County. She was diagnosed with severe vertigo in 1994, and later with diffuse anthralgia, fibromyalgia syndrome, and hypothyroidism. Her physician notified SCI-Muncy that Koch's conditions prevented her from working more than 8 hours per day. The condition and work restrictions are of indefinite duration.

Nevertheless, Koch continued to work with the restrictions between 1994 and 1997. In April, 1997, the Pennsylvania Department of Corrections notified Koch that it would no longer

honor her request to work with restriction due to her inability to perform the essential functions of her position.

Koch was suspended without pay or benefits effective May 5, 1997, then placed on leave without pay but with benefits on May 12, 1997. On November 5, 1997, Koch was placed on sick leave without pay and without benefits. She retired effective March 7, 1998. Koch filed a charge of discrimination with the Equal Employment Opportunity Commission, which issued a "right-to-sue-letter" on ;March 17, 1998. This suit followed.

On August 11, 1998, the court granted Koch's motion for leave to amend the complaint. An amended complaint was filed on August 18, 1998. On September 1, 1998, defendants renewed their motion to dismiss the complaint, incorporating therein a motion to dismiss the original complaint and addressing the sole change added in the amended complaint,

consisting of a letter from the grievance officer of Koch's union purporting to waive a grievance related to the termination.

Before the court is the motion to dismiss the amended complaint.

DISCUSSION:

We have this day issued a memorandum and order in Sortman v. Commonwealth of Pennsylvania, Nc. 4:CV-98-0891, in which the issues relative to the motion to dismiss are identical in all material aspects to the instant motion. For the reasons stated in that memorandum and order, the instant motion to dismiss will be granted.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Defendants' renewed motion (record document no. 13) to dismiss the complaint is granted, and the amended complaint is

dismissed.

2. The clerk is directed to close the file.

/s/ James F. McClure, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CYNTHIA M. SORTMAN,	:	
Plaintiff	:	**No. 4:CV-98-0891**
v.	:	**(Judge McClure)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CORRECTIONS, and STATE CORRECTIONAL INSTITUTION-MUNCY,	:	
Defendants	:	

MEMORANDUM

December 3, 1998

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BACKGROUND:

On June 4, 1998, plaintiff Cynthia M. Sortman commenced this action with the filing of a complaint pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq. Sortman was employed as a corrections officer at the Pennsylvania State Correctional Institution at Muncy, Lycoming County. She was diagnosed with multiple sclerosis in 1994 and was prescribed the drub, Beta-Interferon. Her physician notified SCI-Muncy that Sortman's condition and medication prevented her from working in temperatures in excess of 80° and from working extended periods of time. The condition and work restrictions are permanent.

Nevertheless, Sortman continued to work with the restrictions between 1994 and 1997. In April, 1997, the Pennsylvania Department of Corrections

(PaDOC) notified Sortman that it would no longer honor her request to work with restrictions due to her inability to perform the essential functions of her position, including overtime and emergencies.

Sortman's employment was terminated effective May 26, 1997. She thereafter filed a charge of discrimination with the Equal Employment Opportunity Commission, which issued a "right-to-sue letter" on March 17, 1998. This suit followed.

On August 11, 1998, the court granted Sortman's motion for leave to amend the complaint. An amended complaint was filed on August 18, 1998. On September 1, 1998, defendants renewed their motion to dismiss the complaint, incorporating therein a motion to dismiss the original complaint and addressing the sole change added in the amended complaint, consisting of a letter from the grievance officer of Sortman's

union purporting to waive a grievance related to the termination.

Before the court is the motion to dismiss the amended complaint.

DISCUSSION:

I. STANDARD

A motion to dismiss under Fed. R. Civ. P. 12(b) (6) admits the well pleaded allegations of the complaint, but denies their legal sufficiency. Hospital Building Co. v. Trustees of the Rex Hospital, 425 U.S. 738, 740 (1976). The complaint must be construed in favor of the plaintiff with every doubt resolved in the plaintiff's favor. In re Arthur Treacher's Franchise Litigation, 92 F.R.D. 398, 422 (E.D. Pa. 1981). That is, the court must accept as true all factual allegations set forth in the complaint as well as all reasonable inferences that can be drawn from them. Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996); Jordan v. Fox, Rothschild, O'Brien

& Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The court looks only to the facts alleged in the complaint and any attachments, without reference to any other parts of the record. Jordan at 1261. "[A] case should not be dismissed unless it clearly appears that no relief can be granted under any set of facts that could be proved consistently with the plaintiff's allegations." Id. (Citing, inter alia, Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). Whether a plaintiff will ultimately prevail is not a consideration for review of a motion under Rule 12(b) (6). Nami at 65.

II. STATEMENT OF FACTS

According to the amended complaint, Sortman began working for SCI-Muncy on April 16, 1984, as a Corrections Officer I, performing the functions and duties of a prison guard. Her performance reviews indicated dependable and outstanding

performance, resulting in additional responsibilities and duties along with salary increases.

On March 18, 1994, Sortman was diagnosed with multiple sclerosis. Her physician provided written notice to SCI-Muncy that the condition required that Sortman be restricted from working in excess of eight hours per day. In August, 1994, Sortman began taking Beta-Interferon, a prescription medication which increases one's sensitivity to heat and sun. Her physician notified SCI-Muncy in September, 1994, that she must be restricted from working in conditions of heat in excess of 80°F and from working in the sun for extended periods of time. From the time of the diagnosis, Sortman's physician also verified that her condition was permanent.

SCI-Muncy accommodated Sortman by allowing her to work with restricted overtime until May, 1997. Her job

performance during that time was rated consistently above average. However, in a letter dated April 23, 1997, the PaDOC denied her requests for work to be for eight hours a day and in an area where the temperature did not exceed 80°. The stated reason for the denial was Sortman's inability to perform the essential job function, including being able to work all posts and to work overtime as required by operational necessities and emergencies.

By letter dated May 2, 1997, the PaDOC notified Sortman that she could no longer continue her employment with the overtime restrictions. SCI-Muncy consistently required individuals serving as Corrections Officer I to work sixteen-hour shifts, i.e. and eight-hour shift followed by eight hours of overtime. Sortman's employment at SCI-Muncy was terminated effective May 26, 1997. A letter dated August 4, 1998, from John M. O'Neill, Director of the Grievance/Arbitration

Department, Council 13 of the American Federation of State, County and Municipal Employees, indicates that the union is willing to waive the mandatory overtime provisions of its collective bargaining agreement with SCI-Muncy if Sortman is found to be a qualified individual with a disability who can be reasonably accommodated only by limiting her work day to eight hours.

III. COLLECTIVE BARGAINING AGREEMENTS AND THE ADA

In Kralik v. Durbin, 130 F.3d 76 (3d Cir. 1997), the Third Circuit held that an accommodation under the ADA that violates a collective bargaining agreement is not reasonable if it violates the legitimate rights of the plaintiff's co-workers under the same agreement. In this case, accommodating Sortman's disability would require violation of the collective bargaining agreement as it relates to

overtime, which is given to the least senior employees in the absence of volunteers. The accommodation sought by Sortman plainly violates the rule of Kralik.

The Third Circuit, however, indicated that rights under a collective bargaining agreement may be waived by agreement of the employer and the union. 130 F.3d at 83. In effect, the "agreement" would consist of a waiver by the union of the right to grieve the accommodation/CBA violation:

> In short, it is appropriate for the union, rather than the employer, to make the determination that the infringement is justifiable by releasing the employer from its obligation to follow the seniority provisions of the collective bargaining agreement to accommodate a qualified individual with a disability.
>
> . . .

. . . We also point out that our decision does not necessarily preclude Kralik from being excused from the forced overtime provisions as the union in the future might assure the Commission that it will agree to the Commission's relieving Kralik from those provisions if she is a qualified individual with a disability who needs the accommodation. Such a waiver would eliminate the basis for our conclusion that the accommodation Kralik seeks is not reasonable, leaving for determination the question of whether Kralik is a qualified individual with a disability who would be entitled to be relieved from forced overtime as a reasonable accommodation.

Id. at 83-84 (footnote omitted).

In this instance, the union (through Mr. O'Neill) provided a letter to the PaDOC which Sortman characterizes as a waiver of the grievance procedure. Actually, the letter provides in part:

> Please be advised that, in the event that it is determined, in either the grievance process or the civil suit, that Ms. Sortman is a qualified individual with a disability, and that she can only be reasonably accommodated by allowing her to work no more than eight hours per day, Council 13 will waive the mandatory overtime provisions of the Collective Bargaining Agreement as they apply to Ms. Sortman.

Amended Complaint, Exhibit A-1. Defendants characterize the letter as "too

little, too late." In essence, we agree.

We first note that the offer to waive the enforcement of the CBA cannot have been part of Sortman's claim presented to the Equal Employment Opportunity Commission or the Pennsylvania Human Relations Commission, as the offer was not made until August 4, 1998, two months after the start of this action and over fourteen months after Sortman's employment was terminated. We find it highly questionable, therefore, that the offer may even be considered by this court.

Regardless, the waiver is actually no waiver at all. The letter states that Sortman must be found to have been a qualified individual with a disability and that the only reasonable accommodation is a limit of eight hours per workday. This determination must be made in the grievance proceedings or in this court. In other words, once Sortman proves her case, the union will agree that a case is not

necessary. The purpose of the exception to the rule announced in Kralik is to permit an employee to continue working despite a CBA provision which might prevent such. The employer is relieved of its obligation to adhere to the CBA, which governs over the ADA, and the inherent conflict between the collective rights of the employees covered by the CBA and the individual employee's rights under the ADA is eliminated thereby.

We also note that the language of Kralik supports defendants' view. The onus is placed on the union "to make the determination that the infringement is justifiable . . ." Kralik at 83. In other words, it is for the union to decide whether the rights of the other employees it represents should be waived in favor of the qualified individual with a disability. See Kralik at 83 n. 8 (". . .the accommodation instead will be made by the disabled employee's coworkers who will lose a

benefit of their seniority status.")

Finally, we note the utter futility of the procedure implicit in the manner in which Sortman attempts to present the waiver to this court. SCI-Muncy had a decision to make in early 1997 regarding Sortman's continuing employment with accommodations. It concluded that the accommodations violated the CBA, thereby exposing it to grievance. Therefore, Sortman was given notice that the accommodation would not be continued. Sortman's inability to continue work without accommodation led to the termination of her employment. She filed complaints with the EEOC and the PHRC. Once a "right to sue" letter issued, she filed a complaint in this court. Once defendants moved to dismiss the complaint, Sortman obtained the letter from the union regarding waiver of enforcement of the CBA. By that time, the adverse job action about which Sortman complains was well

over a year in the past. It is impossible in these circumstances for an employer to refrain from making its own decision about which course to take because it is already subject to liability one way or another. If the union does not waive enforcement of the CBA, the employer is liable if it has kept the employee. If the union waives enforcement of the CBA, the employer is liable if it has terminated the employee. Yet the employer has no way of knowing which course the union will take at the time that it makes the employment decision.

In this instance, Sortman was given notice on May 2, 1997, that the accommodation would not be continued. It was at that time that a waiver of the enforcement of the CBA should have been sought, or the subject at least broached with the union. The effect of the late waiver is to render retroactively the action of SCI-Muncy unreasonable, despite the

fact that it was reasonable at the time. Kralik does not require, or even suggest, that this assault on common sense is required under the ADA.

Two other points raised by Sortman also need to be addressed. She stresses that she worked for a considerable time with the accommodation. As noted in Kralik, a union's apparent acquiescence in a temporary arrangement does not indicate that it will be willing to refrain from pursuing a grievance in the future. Kralik at 83 n.7. Sortman also points to her exemplary employment record. Nothing in Kralik suggests that a commendable employment record excuses an employer from enforcement of a CBA, and so the record is immaterial for present purposes.

IV. CONCLUSION

The accommodations for Sortman's disability made by SCI-Muncy violated a CBA and therefore were not reasonable.

Under Kralik, the ADA is not violated in these circumstances. The exception discussed in Kralik is not applicable because there was no timely waiver of enforcement of the CBA by the union.

Defendants' motion to dismiss will be granted. An appropriate order will issue.

/s/ James F. McClure, Jr.
United States District Judge

CYNTHIA M. SORTMAN,	:	
Plaintiff	:	**No. 4:CV-98-0891**
v.	:	**(Judge McClure)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CORRECTIONS, and STATE CORRECTIONAL INSTITUTION-MUNCY,	:	
Defendants	:	

ORDER

December 3, 1998

For the reasons stated in the accompanying memorandum, IT IS ORDERED THAT:

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1. Defendants' renewed motion (record document no. 13) to dismiss the complaint is granted, and the amended complaint is dismissed.
2. The clerk is directed to close the file.

/s/ James F. McClure, Jr.
United States District Judge

Amendment XI. Suits Against States

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 U.S.C. § 12101. Findings and purpose

(a) Findings

The Congress finds that--

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of

discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory

effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and

relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses

resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter–

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth

amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes--

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration--

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue

hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most

effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

. . . .

42 U.S.C. § 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of

competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

29 C.F.R. § 1630.2 Definitions.

. . . .

(o) Reasonable accommodation.

(1) The term reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be

considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

. . . .